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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 885

JOSEPH DANIEL HOLT,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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March, 1969

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. CE 8-0030

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On February 24, 1969, this Court entered its order denying certiorari in the above-captioned criminal proceedings. The Petitioner above-named respectfully petitions this Honorable Court for a rehearing of his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in the above matter, and in support of his petition represents to the Court as follows:

We reserve our argued position as to each of the points initially raised, but address ourselves solely to that feature of this Court's decision wherein we believe the Court may now be convinced that the result of its decision in denying certiorari in the case at bar, when viewed in the light of its most recent decision in *Spinelli* v. *United States,* — U.S. —, 37 Law Week 4110, announced January 27, 1969 and after the instant case had been submitted, constitutes an incongruity in the decisional law of "probable cause."

In *Spinelli* v. *United States, supra,* the accused challenged the constitutionality of the warrant which authorized the F.B.I. search that subsequently uncovered evidence necessary to the conviction. Justice Harlan premised the granting of certiorari upon a belief that the principles of *Aguilar* v. *Texas,* 378 U.S. 108, should be further explicated The Court observed:

> "In *Aguilar,* a search warrant had issued upon an affidavit of police officers who swore only that they had 'received reliable information from a credible person and do believe' that narcotics were being illegally stored on the described premises. While recognizing that the constitutional requirement of probable cause can be satisfied by hearsay information, this Court held the affidavit inadequate for two reasons. First, the application failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable.' " 37 Law Week, 4110, 4111.

This Court's decision in *Spinelli* is clearly retroactive, and applicable to the case at bar. It is now manifestly clear that in order to establish requisite "probable cause" sufficient to form the basis for either a warrantless arrest, as in the case at bar, or for the issuance of a search warrant, as in *Spinelli,* the previously proven reliability of an informant, such as Tripp, must first be shown by positive, clear and convincing evidence. Secondly, regardless of the proven reliability of such informant or the quality of information shown to have been previously obtained from this

source, the officers seeking either the issuance of a warrant, or to preserve evidentiary fruits seized and obtained incident to a warrantless arrest and search, are required to show and establish by competent evidence within their personal knowledge, corroborative facts or evidence which, standing alone and unaided by the so-called "tip" received from such reliable informant, clearly reflect criminal conduct on the part of the accused. And, in determining the adequacy of such corroborative evidence obtained, the officers are forewarned that their observations of the accused must be independent of the informant's tip and clearly constitute criminal conduct—not merely suspicious acts on the part of their suspect. In this regard, Justice Harlan observes that the conduct or acts by the accused are not endowed with an aura of suspicion by virtue of the informant's tip.

Relying on *Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329, the court below seemed to conclude in the instant case that although neither the informant nor the reliable character of his information were known to Agent Copeland at the time of petitioner's arrest herein, testimony of other agents elicited by the respondent-Government during trial herein, regarding their dealings with the informant, Tripp, could somehow be imputed to the knowledge of the arresting agent, thus constituting the "tip" received as information from a reliable source, which when coupled with the fact of petitioner's presence at the airport, arose to the dignity of "probable cause." Here, however, the informant admittedly caused petitioner to be present at the airport on an appointed date and time, and at the specific direction of the Secret Service Agents, who

simultaneously had petitioner under surveillance. But, the factual difference becomes clear when it is observed that in the instant case, the very agents who had planned the meeting between petitioner and Tripp for approximately one week were obviously without sufficient and reliable information with which to obtain a search warrant prior to the date of rendezvous. Thus, these agents had petitioner under surveillance for the sole purpose of obtaining the requisite corroboration of their informant's "tip," and they gleaned absolutely nothing from their assignment, prior to petitioner's arrest. Moreover, and contrary to the factual inferences drawn by the court below, the only testimony tending to establish the known reliability of the subject informant was elicited from Agent Charles Kunkel, who stated that he had on one occasion made an arrest based upon information received from Tripp (R. 99, 102-105), but there is no evidence on this record to indicate that any arrest made on the basis of Tripp's information was known to have resulted in conviction, that the information thus received had been otherwise proven accurate and reliable, or that such witness had ever had occasion to discuss the reliability of such informant with the arresting agent, Copeland, or anyone else.

It is thus submitted that the decisional law resulting from this Court's denial of certiorari in the case at bar, when compared with the decisional law subsequently announced in *Spinelli* v. *United States, supra*, constitutes an incongruity in the law of "probable cause," and for this reason, the Petition for Rehearing should be granted.

Respectfully submitted,

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March, 1969

CERTIFICATE OF COUNSEL

I, Herbert K. Hyde, Counsel of Petitioner, hereby certify that I am one of the attorneys for the Petitioner in this cause; that I make this certificate in compliance with the Rules of this Court; and, that in my judgment, the within and foregoing Petition for Rehearing is well founded, filed in good faith, and is not interposed for delay.

HERBERT K. HYDE
Counsel for Petitioner